

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

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Report

TO: Members of the Judicial Council

FROM: Civil and Small Claims Advisory Committee
Hon. Elihu M. Berle, Chair
Case Management Subcommittee
Hon. Arthur E. Wallace, Chair
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DATE: October 2, 2003

SUBJECT: Sanctions (amend Cal. Rules of Court, rule 227) (Action Required)

Issue Statement

Rule 227 provides sanctions for violations of the California Rules of Court. It is not clear whether the rule authorizes sanctions not just for violations of the rules in Title Two, but also for violations of all the rules relating to general civil cases and other specified types of civil cases in the Rules of Court. And it is not clear whether insurers and other individuals or entities whose consent is necessary for the disposition of a case are covered by the rule.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council amend rule 227, effective January 1, 2004, to clarify its scope and to modify the definition of "person" so that it is clear that the rule applies to insurers and others whose consent is necessary for the disposition of a case.

The text of the amended rule is attached at pages 4–5.

Rationale for Recommendation

Scope of the Rule

Rule 227 authorizes sanctions for violations of the civil trial court rules in the California Rules of Court. It is intended to be a broad rule prescribing sanctions for failures to comply with those rules. However, when the rule was amended in 2001, subdivision (a) was written to state that the rule "applies to the rules in the California Rules of Court, Title Two (Pretrial and Trial Rules)."

Although most of the civil trial court rules are located in Title Two, some are not. For instance, the rules relating to appeals from limited civil and small claims cases are located in Title One. Rules relating to civil proceedings in complex cases, small claims cases, and other proceedings are located in Title Five. And rules relating to probate proceedings are in Title Seven.

To clarify that persons may be sanctioned under rule 227 for violations of any of the trial court rules in the California Rules of Court relating to civil cases, except in the area of family and juvenile law, and to provide well-defined procedures for imposing sanctions, rule 227 should be amended. The amended rule would state specifically that it applies to all rules relating to general civil cases, unlawful detainer cases, probate proceedings, civil proceedings in the appellate division of the superior court, and small claims cases.

Definition of "Person"

The current definition of "person" in rule 227 is ambiguous. It describes some types of individuals whom the rule "includes." Hence it can be interpreted narrowly so as not to cover insurers or other persons or entities whose consent is necessary in the disposition of a case, but who are not listed in the rule. Their failure to appear at a mandatory settlement conference under rule 222 should be sanctionable under rule 227. Hence, rule 227 should be amended to specifically provide that these individuals or entities are subject to sanctions for failure to comply with the rules.

Other Changes

A few additional stylistic changes, such as replacing "shall" with "must" throughout the rule, have been made to rule 227.

Alternative Actions Considered

Because of the need to clarify the scope of rule 227, the committee did not consider alternatives to amending subdivision (a). As to subdivision (b), although the committee agreed that the rule should expressly cover "insurers and other individuals or entities whose consent is necessary for the disposition of the case," it considered various alternative means to state this, as discussed below.

Comments From Interested Parties

Six comments were received on this proposal from interested parties.¹ The commentators included the State Bar's Committee on the Administration of Justice (CAJ), a local bar association, two presiding judges, and the general counsel for a trial court. They generally agreed with the proposal.

¹ A chart summarizing the comments is attached at pages 6–9.

The main concerns raised by the commentators related to the definition of "person." The version of amended rule 227 circulated for comments stated that the term "person" includes a "claims representative." The CAJ suggested changing "includes" to "means," "insurance claims representative" to "insurer," and "person" at the end of the definition to "individual or entity." The committee agreed with these proposed modifications.

The CAJ also raised a question whether expanding rule 227 to cover insurers posed any legal difficulty under *Trans-Action Commercial Investors Ltd. v. Firmateer, Inc. (Jelinek)* (1997) 60 Cal.App4th 352. The Civil and Small Claims Advisory Committee is satisfied that the proposed amendments to rule 227 are proper under *Jelinek* and other applicable California law. *Jelinek* held that former rule 227 was invalid to the extent that it allowed sanctions that were inconsistent with the limit and conditions provided by an applicable statute. Amended rule 227 is not inconsistent with any statute or statutory scheme.

First, rule 227 applies only to violations of Rules of Court, and not to violations of local rules or orders that are covered by statutes. Nor is the amended definition of "person" in amended rule 227 inconsistent with the term as it is used in Code of Civil Procedure section 177.5, which provides for sanctions for failure to comply with court orders. Although section 177.5 does not expressly extend to insurers, it uses the open-ended term "includes" in describing the types of persons covered by the statute. Amending rule 227 to expressly cover insurers and other individuals or entities whose consent is necessary for the disposition of a case is not inconsistent with this statutory provision.

Implementation Requirements and Costs

Courts will not be required to undertake any significant additional measures to implement their sanctions authority if rule 227 is amended as proposed. The amendments are designed to clarify the scope and applicability of the rule. They should make the law relating to sanctions for violations of the Rules of Court easier to predict and apply. More generally, the amendments should facilitate the administration of justice.

Attachments

Rule 227 of the California Rules of Court is amended, effective January 1, 2004, to read:

Rule 227. Sanctions in respect to rules

- (a) **[Applicability]** This sanctions rule applies to the rules in the California Rules of Court, ~~Title Two, (Pretrial and Trial Rules)~~ relating to general civil cases, unlawful detainer cases, probate proceedings, civil proceedings in the appellate division of the superior court, and small claims cases.
- (b) **[Sanctions]** In addition to any other sanctions permitted by law, the court may order a person, after written notice and an opportunity to be heard, to pay reasonable monetary sanctions to the court or an aggrieved person, or both, for failure to comply with the applicable rules ~~in Title Two~~, unless good cause is shown. For the purposes of this rule, “person” ~~includes~~ means a party, a party’s attorney, ~~or~~ a witness, and an insurer or any other individual or entity whose consent is necessary for the disposition of the case. If a failure to comply with ~~a~~ an applicable rule in Title Two is the responsibility of counsel and not of the party, any penalty ~~shall~~ must be imposed on counsel and ~~shall~~ must not adversely affect the party’s cause of action or defense thereto.
- (c) **[Notice and procedure]** Sanctions ~~shall~~ must not be imposed under this rule except upon notice in a party’s motion papers or upon the court’s own motion after the court has provided notice and an opportunity to be heard. A party’s motion for sanctions ~~shall~~ must (1) set forth the applicable rule ~~in Title Two~~ that has been violated, (2) describe the specific conduct that is alleged to have violated the rule, and (3) identify the attorney, law firm, party, ~~or~~ witness, or other person against whom sanctions are sought. The court on its own motion may issue an order to show cause that ~~shall~~ must (1) set forth the applicable rule ~~in Title Two~~ that has been violated, (2) describe the specific conduct that appears to have violated the rule, and (3) direct the attorney, law firm, party, ~~or~~ witness, or other person to show cause why sanctions should not be imposed against them for violation of the rule.
- (d) **[Award of expenses]** In addition to the sanctions awardable under (b), the court may order the person who has violated ~~a~~ an applicable rule in ~~in Title Two~~ to pay to the party aggrieved by the violation that party’s reasonable expenses, including reasonable attorney fees and costs, incurred in connection with the sanctions motion or the order to show cause.

- 1 (e) **[Order]** An order imposing sanctions ~~shall~~ must be in writing and ~~shall~~
2 must recite in detail the conduct or circumstances justifying the order.

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Mr. Grant Barrett General Counsel Superior Court of California, County of Calaveras	A	N	On the definition of "person": "includes" vs. "means" is a tough call. How about "is defined as"? But I prefer to use "includes."	The committee concluded that the word "means" is preferable to "includes." (See response to comment 2, below.)
2.	Committee on Administration of Justice The State Bar of California San Francisco, California	A	Y	<p>The Committee on Administration of Justice (CAJ) unanimously supports the proposed amendment to rule 227(a), which would specify the types of cases to which the rule applies.</p> <p>The vast majority of CAJ supports the concept of the proposed amendment to rule 227(b), but believes the second sentence should be modified to read as follows:</p> <p style="padding-left: 40px;">For purposes of this rule, "person" includes <u>means</u> a party, a party's attorney, a witness, and an insurance claims representative <u>insurer</u> or any other person <u>individual or entity</u> whose consent is necessary for the disposition of the case.</p> <p>CAJ understands that the proposed amendment to rule 227(b) is intended, at least in part, to harmonize that rule with rule 222, which provides in part that "[t]rial counsel, parties, and persons with full authority to settle the case must personally attend the conference, unless excused by the court for good cause. If any consent to settle is required for any reason, the party with that consensual authority must be personally present at the conference." In the experience of CAJ's members, meaningful participation by a party's insurer is often necessary for a productive settlement</p>	<p>The committee agreed with the proposed modifications to rule 227(b). The CAJ's support for the amendments to rule 227 is noted.</p> <p>CAJ's proposed changes have been included in the final version of amended rule 227(b).</p> <p>The CAJ's understanding of the proposed amendments to rule 227 is correct.</p>

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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				<p>conference to take place. CAJ believes it is appropriate to impose sanctions on a party's insurer, if that insurer is ordered to attend a settlement conference pursuant to rule 222 and fails to attend, and rule 227(b) should make that clear.</p> <p>The rule should, however, provide for sanctions against an "insurer" rather than an "insurance claims representative." If, for example, an individual claims representative fails to attend based on a company directive, it would be unfair to impose sanctions on that individual. Even if he or she were not following a specific directive, the individual claims representative would presumably be acting as the agent of the insurer. The term "insurer" is intended to refer to the actual insuring entity, which would bear the legal responsibility for any failure to attend.</p> <p>CAJ believes the word "person" at the end of the sentence should be changed to "individual or entity." This change in language would follow the suggested change of "insurance claims representative" to "insurer." In addition, using "person" as part of the definition of "person" would be somewhat circular.</p> <p>CAJ believes that rule 227(b) should be amended to use the term "means" rather than "includes." Rule 227(b) identifies specific individuals and entities covered by the definition of "person"—a party, a party's attorney, a witness, and (if amended as CAJ proposes) an insurer or any other individual or entity</p>	<p>The committee agreed that the term "insurers" is preferable to "insurance claims representative." The CAJ's rationale is persuasive.</p> <p>The committee agreed that "person" should be changed to "individual or entity." The CAJ's rationale is persuasive.</p> <p>The committee agreed that the term "means" should be used instead of "includes." The CAJ's rationale is persuasive.</p>

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				<p>whose consent is necessary for the disposition of the case. A definition <i>limited</i> to those categories, by use of the term "means," appears to CAJ to be broad enough to encompass all relevant individuals and entities. The term "includes" in the current version of the rule is open-ended, and could end up encompassing individuals and entities that are not contemplated by the rules, and against whom it would not be appropriate to impose sanctions.</p> <p>A minority of CAJ believes rule 227(b) should be limited to individuals and entities that are "before the court." In the view of those members, a party's insurer is not "before the court," and the existing rule 227(b) appropriately and adequately deals with non-compliance, by authorizing the imposition of sanctions on a party or the party's attorney.</p> <p>A question has also been raised concerning the validity of the proposed amendment to rule 227(b), in light of <i>Trans-Action Commercial Investors, Ltd. v. Firmateer, Inc. (Jelinek)</i> (1997) 60 Cal.App.4th 352. As the Court noted in <i>Jelinek</i>, "[I]t is settled that in order to comply with the constitutional requirement of consistency with statutory law, a rule of court must not conflict with the statutory intent. . . A rule of court may go beyond the provisions of a related statute so long as it reasonably furthers the statutory purpose." <i>Id.</i> at 364 (citations omitted). The court in <i>Jelinek</i> ultimately concluded that a prior version of rule 227 "conflicts with the legislative intent</p>	<p>The committee agreed with the CAJ majority position on the proposed amendments to rule 227(b). The rule should extend to insurers and other persons or entities whose consent is necessary to the disposition of a case.</p> <p>The committee is satisfied that the proposed amendments to rule 227 are legally proper under <i>Jelinek</i> and other applicable law. Rule 227 was amended in 2001 in response to the <i>Jelinek</i> decision and applies only to violations of the California Rules of Court. Violations of local rules and orders are covered separately by statutes. Amended rule 227 would not be inconsistent with these statutes.</p> <p>As the CAJ notes, the current version of</p>

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				manifested in the sanctions statutes, to the extent the rule purports to allow sanctions inconsistent with the limits and conditions provided in an applicable statute." <i>Id.</i> at 371. CAJ notes that the current language of rule 227 tracks the language of Code of Civil Procedure section 177.5, which provides: "For the purposes of this section, the term 'person' includes a witness, a party, a party's attorney, or both." CAJ has not reached a definitive conclusion on whether it believes the proposed amendment to rule 227(b) meets the criteria set forth in <i>Jelinek</i> , but does raise the issue here because it believes the issue should be resolved before the proposed change is made to the rule.	rule 227 and section 177.5 in defining "person" both use the word "includes," which is open-ended. Amended rule 227 would expressly add to the list of persons included "an insurer or other individual or entity whose consent is necessary for the disposition of the case." This addition is not inconsistent with either the rule or the statute. Because it would clarify the proper scope of the rule, the amended definition should be adopted.
3.	Ms. Cynthia Denenholz Superior Court of California, County of Sonoma	AM	N	You should add "or other person" after "witness" in subdivision (e) to conform to the proposed addition in line 26.	The committee agreed.
4.	Mr. Robert Gerard President Orange County Bar Association	A	Y	Agrees with proposed changes, without specific comments.	No response required.
5.	Hon. Suzanne N. Kingsbury Presiding Judge Superior Court of California, County of El Dorado	A	N	Agrees with proposed changes, without specific comments.	No response required.
6.	Hon. Dennis E. Murray Presiding Judge Superior Court of California, County of Tehama	A	N	I am not sure I understand why local rule violations were excluded.	Rule 227 was amended in 2001 to apply only to violations of the California Rules of Court. Sanctions for violations of local rules are covered under statutory law. (See response to comment 2, above, <i>supra</i> .)

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